525

MANITOBA SCHOOL CASE (1894)

THE

JUDGMENT

OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE (IMPERIAL) PRIVY COUNCIL

TOGETHER WITH THE

IMPERIAL ORDER IN COUNCIL

AND THE

REMEDIAL ORDER IN COUNCIL

OTTAWA
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JUDGMENT

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DOWNING STREET, 19th February, 1895.

MY LORD,—I have the honour to transmit to you for the information of your government, copies of the judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Brophy and others and the Attorney General of Manitoba, from the Supreme Court of Canada.

I have the honour to be,
Your most obedient humble servant,

(Signed), R. H. MEADE,
For the Secy. of State.

JUDGMENT *of the Lords of the Judicial Committee of the Privy Council on the appeal of Brophy and others* v. *the Attorney General of Manitoba, from the Supreme Court of Canada, delivered 29th January, 1895.*

PRESENT :

The LORD CHANCELLOR, LORD MACNAUGHTEN,
LORD WATSON, LORD SHAND.

(Delivered by the Lord Chancellor).

In the year 1890, two Acts were passed by the legislature of Manitoba relating to education. One of these created a Department of Education and an "Advisory Board." The Board was to consist of seven members, four of whom were to be appointed by the Department of Education, two to be elected by the Public and High School teachers of the province, and one to be appointed by the University Council. The Advisory Board were empowered (amongst other things) to authorize text books for the use of pupils, and to prescribe the form of religious exercises to be used in schools.

The other Act, which was termed "The Public Schools Act," established a system of public education "entirely non-sectarian," no religious exercises being allowed except those conducted according to the regulations of the "Advisory Board." It will be necessary hereafter to refer somewhat more in detail to the provisions of this Act.

The Act came into force on the 1st of May, 1890. By virtue of its provisions, by-laws were made by the municipal corporation of Winnipeg, under which a rate was to be levied upon Protestant and Roman Catholic ratepayers alike for school purposes. An application was thereupon made to the Court of Queen's Bench of Manitoba to quash these by-laws on the ground that the Public Schools Act, 1890, was *intra vires* of the Provincial Legislature, inasmuch as it prejudicially affected a right or privilege with respect to denominational schools which the Roman Catholics had by law or practice in the province at the union. The court of Queen's Bench refused the application, being of opinion that the act was *intra vires*. The Supreme Court of Canada took a different

view, but upon appeal this Board reversed their decision, and restored the judgment of the Court of Queen's Bench.

Memorials and petitions were afterwards presented to the Governor General in Council on behalf of the Roman Catholic minority of Manitoba by way of appeal against the Education Acts of 1890. These memorials and petitions having been taken into consideration, a case in relation thereto was in pursuance of the provisions of the Supreme and Exchequer Courts Act referred by the Governor General in Council to the Supreme Court of Canada. The questions referred for hearing and consideration were the following:—

"(1) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, Canada?

"(2) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to or either of them?

"(3) Does the decision of the Judicial Committee of the Privy Council in the cases of Barrett *vs.* The City of Winnipeg, and Logan *vs.* The City of Winnipeg dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the Union under the statutes of the province have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials?

"(4) Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?

"(5) Has His Excellency the Governor General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions assuming the material facts to be as stated therein, or has His Excellency the Governor General in Council any other jurisdiction in the premises?

"(6) Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority 'a right or privilege in relation to education' within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools, within the meaning of subsection 3 of section 93 of the British North America Act, 1867; if said section 93 be found applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council?"

The learned judges of the Supreme Court were divided in opinion upon each of the questions submitted. They were all, however, by a majority of three judges out of five answered in the negative.

The Appeal to the Governor General in Council was founded upon the 22nd section of the Manitoba Act, 1870, and the 93rd section of the British North America Act, 1867. By the former of these statutes (which was confirmed and declared to be valid and effectual by an Imperial Statute) Manitoba was created a province of the Dominion.

The 2nd section of the Manitoba Act enacts that after the prescribed day the British North America Act shall "except those parts thereof which are in the terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said Act." It cannot be questioned therefore that section 93 of the British North America Act (save such parts of it as are specially applicable to some only of the provinces of which the Dominion was in 1870 composed) is made applicable to the province of Manitoba, except in so far as it is varied by the Manitoba Act. The 22nd section of that Statute deals with the same subject-matter as section 93 of the British North America Act. The 2nd subsection of this latter section

may be discarded from consideration, as it is manifestly applicable only to the provinces of Ontario and Quebec. The remaining provisions closely correspond with those of section 22 of the Manitoba Act. The only difference between the introductory part and the 1st subsection of the two sections, is that in the Manitoba Act the words "or practice" are added after the word "law" in the 1st subsection.

The 3rd subsection of section 22 of the Manitoba Act is identical with the 4th subsection of section 93 of the British North America Act. The 2nd and 3rd subsections respectively are the same, except that in the 2nd subsection of the Manitoba Act, the words "of the legislature of the province or" are inserted before the words "any provincial authority," and that the 3rd subsection of the British North America Act commences with the words: "Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province." In view of this comparison, it appears to their Lordships impossible to come to any other conclusion than that the 22nd section of the Manitoba Act was intended to be a substitute for the 93rd section of the British North America Act. Obviously all that was intended to be identical has been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier statute, they must be regarded as indicating the variations from those provisions intended to be introduced in the province of Manitoba.

In their Lordship's opinion, therefore, it is the 22nd section of the Manitoba Act, which has to be construed in the present case, though it is of course legitimate to consider the terms of the earlier Act, and to take advantage of any assistance they may afford in the construction of enactments with which they so closely correspond and which have been substituted for them.

Before entering upon a critical examination of the important section of the Manitoba Act, it will be convenient to state the circumstances under which that Act was passed, and also the exact scope of the decision of this Board in the case of Barrett *vs.* The City of Winnipeg, which seems to have given rise to some misapprehension. In 1867, the union of the provinces of Canada, Nova Scotia and New Brunswick took place. Among the obstacles which had to be overcome in order to bring about that union, none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada, a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that province. The 2nd subsection of section 93 of the British North America Act extended all the powers, privileges and duties which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that province to the dissentient schools of the Protestant and Roman Catholic inhabitants of Quebec. There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario, with regard to education, were shared by the members of the same communion in the territory which afterwards became the province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teachings of their church, and consider that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their church. At the time, when the province of Manitoba became part of the Dominion of Canada, the Roman Catholic and Protestant populations in the province were about equal in number. Prior to that time, there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them by means of funds voluntarily contributed by the members of their own communion. None of them received any State aid.

The terms upon which Manitoba was to become a province of the Dominion were matter of negotiation between representatives of the inhabitants of Manitoba and of the Dominion Government. The terms agreed upon, so far as education was concerned, must be taken to be embodied in the 22nd section of the Act of 1870. Their Lordships do not think that anything is to be gained by the inquiry how far the provisions of this

section placed the province of Manitoba in a different position from the other provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification.

Among the very first measures passed by the Legislature of Manitoba was an Act to establish a system of education in the province. The provisions of that Act will require examination. It is sufficient for the present to say that the system established was distinctly denominational. This system, with some modifications, of the original scheme, the fruit of later legislation, remained in force until it was put an end to by the Acts which have given rise to the present controversy.

In Barrett's case the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the province at the Union. Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed, either by law or in practice, was the right or privilege of establishing and maintaining for the use of members of their own church such schools as they pleased. It appeared to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the first subsection of section 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed: it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this board upon the first subsection reduced within very narrow limits the protection afforded by that subsection in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the legislature, if violence were done to the language in which their legislation has taken shape, but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst, however, it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the legislature, it is quite legitimate where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention.

With these preliminary observations, their Lordships proceed to consider the terms of the 2nd and 3rd subsections of section 22 of the Act of 1870, upon the construction of which the questions submitted chiefly depend. For the reasons which have been given, their Lordships concur with the majority of the Supreme Court in thinking that the main issues are not in any way concluded either by the decision in Barrett's case or by any principles involved in that decision.

At the outset this question presents itself. Are the 2nd and 3rd subsections, as contended by the respondent, and affirmed by some of the judges of the Supreme Court, designed only to enforce the prohibition contained in the 1st subsection? The arguments against this contention appear to their Lordships conclusive. In the first place that subsection needs no further provision to enforce it. It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, and therefore null and void. It was so decided by this board in Barrett's case. A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd subsection, but their Lordships were satisfied that the provisions of subsections 2 and 3 did not

"operate to withdraw such a question as that involved in the case from the jurisdiction "of the ordinary tribunals of the country." It is hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If, for example, the Supreme Court of Canada, and this committee on appeal, declared an enactment of the legislature of Manitoba relating to education to be *intra vires*, and the Governor General in Council on an appeal to him considered it *ultra vires*, what would happen? If the Provincial Legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the provisions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared *ultra vires* by the courts which had decided that the provisions of the section had not been violated by the legislature of the province. If, on the other hand, the Governor General declared a provincial law to be *intra vires*, it would be an ineffectual declaration. It could only be made effectual by the action of the courts, which would have for themselves to determine the question which he decided, and if they arrived at a different conclusion and pronounced the enactment *ultra vires*, it would be none the less null and void, because the Governor General in Council had declared it *intra vires*. These considerations are of themselves most cogent to show that the 2nd subsection ought not to be construed as giving to parties aggrieved an appeal to the Governor General in Council concurrently with the right to resort to the courts in case the provisions of the 1st subsection are contravened, unless no other construction of the subsections be reasonably possible. The nature of the remedy, too, which the 3rd subsection provides, for enforcing the decision of the Governor General, strongly confirms this view. That remedy is either a provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without legislation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

So far the matter has been dealt with apart from an examination of the terms of the 2nd subsection itself. The considerations adverted to would seem to justify any possible construction of that subsection which would avoid the consequences pointed out. But when its language is examined, so far from presenting any difficulties, it greatly strengthens the conclusion suggested by the other parts of the section. The first subsection is confined to a right or privilege of a "class of persons" with respect to denominational education "at the union," the 2nd subsection applies to laws affecting a right or privilege "of the Protestant or Roman Catholic minority" in relation to education. If the object of the 2nd subsection had been that contended for by the respondent, the natural and obvious mode of expressing such intention would have been to authorize an appeal from any Act of the Provincial Legislature affecting "any such right or privilege as aforesaid." The limiting words "at the Union" are, however, omitted, for the expression "any class of persons" there is substituted "the Protestant or Roman Catholic minority of the Queen's subjects," and instead of the words "with respect to denominational schools," the wider term "in relation to education" is used.

The 1st subsection invalidates a law affecting prejudicially the right or privilege of "any class" of persons, the 2nd subsection gives an appeal only where the right or privilege affected is that of the "Protestant or Roman Catholic minority." Any class of the majority is clearly within the purview of the 1st subsection, but it seems equally clear that no class of the Protestant or Catholic majority would have a *locus standi* to appeal under the 2nd subsection, because its rights or privileges had been affected. Moreover, to bring a case within that subsection it would be essential to show that a right or privilege had been "affected." Could this be said to be the case because a void law had been passed which purported to do something but was wholly ineffectual? To prohibit a particular enactment and render it *ultra vires*, surely prevents its affecting any rights.

It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two subsections.

In their Lordships' opinion the 2nd subsection is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the subsection extend to rights and privileges acquired by legislation subsequent to the union? It extends in terms to "any" right or privileges of the minority affected by an Act passed by the legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was passed. Their lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor General in Council against an Act passed by the Provincial Legislature, because in abrogated rights conferred by previous legislation, whilst if there had been no previous legislation, the Acts complained of would not only have been *intra vires*, but could not have afforded any ground for any appeal. There is no doubt force in this argument, but it admits, their Lordships think, of an answer.

Those who were stipulating for the provisions of section 22 as a condition of the union, and those who gave their legislative assent to the act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the legislature of an educational system obnoxious either to Catholics or Protestants would not be contemplated as possible. As has been already stated, the Roman Catholics and Protestants in the province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The legislature of Manitoba first met on the 15th of March, 1871. On the 3rd of May following, the Education Act of 1871 received the royal assent. But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the legislature, and it might under such conditions be impossible for the minority to prevent the creation at the public cost of schools which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the Protestants of the province as the change to an unsectarian system was by the Catholics.

Whether this explanation be the correct one or not, their Lordships do not think that the difficulty suggested is a sufficient warrant for departing from the plain meaning of the words of the enactment, or for refusing to adopt the construction which apart from this objection would seem to be the right one.

Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act, it is unnecessary to refer at any length to the arguments derived from the provisions of section 93 of the British North America Act. But in so far as they throw light on the matter, they do not in their Lordships' opinion weaken, but rather strengthen the views derived from a study of the later enactment. It is admitted that the 3rd and 4th subsections of section 93 (the latter of which is, as has been observed, identical with subsection 3, of section 22 of the Manitoba Act) were not intended to have effect merely when a provincial legislature had exceeded the limit imposed on its powers by subsection 1, for subsection 3 gives an appeal to the Governor General, not only where a system of separate or dissentient schools existed in a province at the time of the union, but also where in any province such a system was "thereafter established by the legislature of the province." It is manifest that this relates to a state of things created by post-union legislation. It was said it refers only to acts or decisions of a "provincial authority," and not to acts of a provincial legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the legislature of the province" in the Manitoba Act, show that in the British North America Act it could not have been intended to comprehend the legislatures under the words "any provin-

cial authority." Whether they be so comprehended or not, has no bearing on the point immediately under discussion.

It was argued that the omission from the 2nd subsection of section 22 of the Manitoba Act of any reference to a system of separate or dissentient schools "thereafter established by the legislature of the province" was unfavourable to the contention of the appellants. This argument met with some favour in the court below. If the words with which the 3rd subsection of section 93 commences had been found in subsection 2, of section 22 of the Manitoba Act, the omission of the following words would no doubt have been important. But the reason for the difference between the subsections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some provinces, in others it might thereafter be established by legislation, whilst in Manitoba, in 1870, no such system was in operation, and it could only come into existence by being "thereafter established." The words which preface the right of appeal in the Act creating the Dominion would therefore have been quite inappropriate in the Act by which Manitoba became a province of the Dominion. But the terms of the critical subsection of that Act, are, as has been shown, quite general, and not made subject to any condition or limitation.

Before leaving this part of the case, it may be well to notice the argument urged by the respondent that the construction which their Lordships have put upon the 2nd and 3rd subsections of section 22 of the Manitoba Act is inconsistent with the power conferred upon the legislature of the province to "exclusively make laws in relation to education." The argument is fallacious. The power conferred is not absolute but limited. It is exerciseable only "subject and according to the following provisions." The subsections which follow, therefore, whatever be their true construction, define the conditions under which alone the Provincial Legislature may legislate in relations to education, and indicate the limitations imposed on, and the exceptions from their power of exclusive legislation. Their right to legislate is not indeed, properly speaking, exclusive, for in the case specified in subsection 3, the Parliament of Canada is authorized to legislate on the same subject. There is, therefore, no such inconsistency as was suggested.

The learned Chief Justice of the Supreme Court was much pressed by the consideration that there is an inherent right in a legislature to repeal its own legislative Acts and that "every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted." He returns to this point more than once in the course of his judgment, and lays down as a maxim of constitutional construction that an inherent right to do so cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution in express words takes away the right, and he states it as his opinion that in construing the Manitoba Act, the court ought to proceed on this principle, and to hold the legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless it could find some restriction of its rights in that respect in express terms in the Constitutional Act.

Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act, as varied by the Manitoba Act. In all other cases, legislative authority rests with the Dominion Parliament. In relation to the subjects specified in section 92 of the British North America Act, and not falling within those set forth in section 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not so as regards education, which is separately dealt with, and has its own code, both in the British North America Act and in the Manitoba Act. It may be said, to be anomalous, that such a restriction as that in question should be imposed on the free action of a legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the legislature to the executive authority? And, yet, this right is expressly and beyond all

controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted under circumstances involving a fetter upon the power of a provincial legislature to repeal its own enactments, their Lordships see no justification for a leaning against that construction, nor do they think it makes any difference whether the fetter is imposed by express words or by necessary implication.

In truth, however, to determine that, an appeal lies to the Governor General in Council in such a case as the present, does not involve the proposition that the Provincial Legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favourable to the appellants, the consequence, as will be pointed out presently, will by no means necessarily be the repeal of the Acts of 1890, or the re-enactment of the prior legislation.

Bearing in mind the circumstances which existed in 1870, it does not appear to their Lordships an extravagant notion that in creating a legislature for the province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be.

Taking it then to be established that the 2nd subsection of section 22 of the Manitoba Act extends to rights and privileges of the Roman Catholic minority acquired by legislation in the province after the union, the next question is, whether any such right or privilege has been affected by the Acts of 1890? In order to answer this question, it will be necessary to examine somewhat more closely than has hitherto been done the system established by the earlier legislation, as well as the change effected by those Acts.

The Manitoba School Act of 1871, provided for a Board of Education of not less than 10 nor more than 14 members, of whom one-half were to be Protestants and the other half Catholics. The two sections of the Board might meet at any time separately. Each section was to choose a chairman, and to have under its control and management the discipline of the schools of the section. One of the Protestant members was to be appointed superintendent of the Protestant schools, and one of the Catholic members superintendent of the Catholic schools, and these two were to be the joint secretaries of the Board, which was to select the books to be used in the schools, except those having reference to religion or morals which were to be prescribed by the sections respectively. The legislative grant for common school education was to be appropriated, one moiety to support the Protestant, the other moiety the Catholic schools. Certain districts in which the population was mainly Catholic were to be considered Catholic school districts, and certain other districts where the population was mainly Protestant were to be considered Protestant school districts. Every year a meeting of the male inhabitants of each district, summoned by the superintendent of the section to which the district belonged, was to appoint trustees, and to decide whether their contributions to the support of the school were to be raised by subscription, by a collection of a rate per scholar, or by assessment on the property of the district. They might also decide to erect a school-house, and that the cost of it should be raised by assessment. In case the father or guardian of a school child was a Protestant in a Catholic district or *vice versa*, he might send the child to the school of the nearest district of the other section, and in case he contributed to the school the child attended, a sum equal to what he would have been bound to pay if he had belonged to that district, he was exempt from payment to the school of the district in which he lived.

Acts amending the education law in some respects were passed in subsequent years, but it is not necessary to refer to them, as in 1881 the Act of 1871 and these amending Acts were repealed. The Manitoba School Act, 1881, followed the same general lines as that of 1871. The number of the Board of Education was fixed at not more than 21, of whom 12 were to be Protestants and 9 Catholics. If a less number were appointed the same relative proportion was to be observed. The Board, as before, was to resolve itself into two sections, Protestant and Catholic, each of which was to have the control

of the schools of its section, and all the books to be used in the schools under its control were now to be selected by each section. There were to be, as before, a Protestant and a Catholic superintendent. It was provided that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and Catholic district might include the same territory in whole or in part. The sum appropriated by the legislature for common school purposes was to be divided between the Protestant and Roman Catholic sections of the Board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts in the province where schools were in operation. With regard to local assessments for school purposes it was provided that the ratepayers of a school district should pay their respective assessments to the schools of their respective denominations, and in no case was a Protestant ratepayer to be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school.

The scheme embodied in this Act was modified in some of its details by later Acts of the legislature, but they did not affect in substance the main features, to which attention has been called. While traces of the increase of the Protestant relatively to the Catholic population may be seen in the course which legislation took, the position of the Catholic and Protestant portions of the community in relation to education was not substantially altered, though the State aid, which at the outset was divided equally between them, had of course to be adjusted and made proportionate to the school population which each supplied.

Their Lordships pass now to the Department of Education and Public Schools Act, 1890, which certainly brought a great change. Under the former these Roman Catholics were not entitled as such to any representation on the Board of Education or on the Advisory Board, which was to authorize text books for the use of pupils and to prescribe the forms of religious exercises to be used in schools. All Protestant and Catholic school districts were to be subject to the provisions of the Public Schools Act. The public schools were all to be free, and to be entirely non-sectarian. No religious exercises were to be allowed unless conducted according to the regulations of the Advisory Board, and with the authority of the school trustees for the district. It was made the duty of the trustees to take possession of all public school property which had been acquired or given for public school purposes in the district. The municipal council of every city, town and village, was directed to levy and collect upon the taxable property within the municipality such sums as might be required by the public school trustees for school purposes. No municipal council was to have the right to exempt any property whatever from school taxation. And it was expressly enacted that any school not conducted according to all the provisions of the Act, or the regulations of the Department of Education, or the Advisory Board, should not be deemed a public school within the meaning of the law, and that such school should not participate in the legislative grant.

With the policy of these Acts their Lordships are not concerned, nor with the reasons which led to their enactment. It may be that as the population of the province became in proportion more largely Protestant, it was found increasingly difficult, especially in sparsely populated districts, to work the system inaugurated in 1871, even with the modifications introduced in later years. But whether this be so or not is immaterial. The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, con-

ducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the Statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

In view of this comparison, it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education, which existed prior to 1890, have not been affected.

Mr. Justice Taschereau says that the legislation of 1890, having been irrevocably held to be *intra vires*, cannot have "illegally" affected any of the rights or privileges of the Catholic minority. But the word "illegally" has no place in the subsection in question. The appeal is given if the rights are in fact affected.

It is true that the religious exercises prescribed for public schools are not to be distinctively Protestant, for they are to be "non-sectarian," and any parent may withdraw his child from them. There may be many too, who share the view expressed in one of the affidavits in Barrett's case, that there should not be any conscientious objections on the part of Roman Catholics to attend such schools, if adequate means be provided elsewhere of giving such moral and religious training as may be desired. But all this is not to the purpose. As a matter of fact, the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the education question prior to 1870. This is recognized and emphasized in almost every line of those enactments. There is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of the Manitoba Act of 1870, which was in truth a parliamentary compact, must be read.

For the reasons which have been given, their Lordships are of opinion that the 2nd subsection of section 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governor General in Council was admissible by virtue of that enactment on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that subsection. The further question is submitted whether the Governor General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor General in Council has jurisdiction, and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd subsection of section 22 of the Manitoba Act.

It is certainly not essential that the Statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these Statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the wants of the great majority of the inhabitants of the province. All legitimate grounds of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions.

Their Lordships will humbly advise Her Majesty that the questions submitted should be answered in the manner indicated by the views which they have expressed.

There will be no costs of this appeal.

IMPERIAL ORDER IN COUNCIL

[L.S.]

At the Court at Osborne House, Isle of Wight,
The 2nd day of February, 1895.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY.

Lord President,
Marquess of Ripon,
Lord Chamberlain,
Lord Kensington,
Mr. Cecil Rhodes.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 29th January, 1895, in the words following, viz. :—

"Your Majesty having been pleased by Your General Order in Council of the 23rd November, 1893, to refer unto this Committee the matter of an Appeal from the Supreme Court of Canada, between Gerald F. Brophy, Noé Chevrier, Henry NapoléonBoire, Roger Goulet, Patrick O'Connor, Francis McPhillips, Frank J. Clark, Joseph Lecomte, Michael Hughes, Henry Brownrigg, Frank Brownrigg, Theophilus Tessier, L. Arthur Leveque, Edmond Trudel, Joseph Honoré Octavien Lambert, Jean Baptiste Poirier, George Couture, J. Ernest Cyr, François Jean David Dussault, Charles Edouard Masse, François Hardis, Joseph Buron, Louis Fournier, Phileas Trudeau, Edouard Guilbault, Romuald Gilbeault, Alphonse Phaneuf, W. Cleophas German, Edward R. Lloyd, Louis Laventure and Louis J. Collin, all of the province of Manitoba, in the Dominion of Canada, on behalf of themselves, and of all other persons forming the Roman Catholic minority of Her Majesty's subjects in the said province, appellants, and the Attorney General of Manitoba, respondent, and likewise the humble petition of the above named appellants, setting forth that this is an appeal from certain opinions pronounced by the Judges of the Supreme Court of Canada, on the 20th February, 1894: that the case in reference to which such opinions were rendered, was on the 7th July, 1893, referred by the Governor General of Canada in Council to the Supreme Court of Canada for hearing and consideration pursuant to the provisions of an Act intituled "An Act respecting the Supreme and Exchequer Courts" (Revised Statutes of Canada, Cap. 135) as amended by an Act of Canada, passed in 1891 (54-55 Vic. cap. 25): that the questions involved in the case, and in this appeal turn upon the construction of certain sections of "The British North America Act, 1867" and of "The Manitoba Act 1870" and upon the effect of certain statutes of the province of Manitoba, in relation to education in that province; that the following questiens were by the said case submitted for the opinion of the Supreme Court:—

"'(1) Is the appeal referred to in the said Memorials and Petitions, and asserted 'thereby, such an appeal as is admissible by subsection 3, of section 93, of the British 'North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 'Victoria (1870), Cap. 3, Canada'?

"'(2) Are the grounds set forth in the Petitions and Memorials such as may be the 'subject of appeal under the authority of the subsections above referred to, or either 'of them'?

"'(3) Does the decision of the Judicial Committee of the Privy Council in the cases 'of Barrett *vs.* The City of Winnipeg, and Logan *vs.* The City of Winnipeg, dispose of 'or conclude the application for redress based on the contention that the rights of the 'Roman Catholic minority, which accrued to them after the Union under the statutes 'of the Province, have been interfered with by the two Statutes of 1890, complained of 'in the said Petitions and Memorials'?

"'(4) Does subsection 3 of section 93 of the British North America Act, 1867, 'apply to Manitoba'?

"'(5) Has His Excellency the Governor General in Council power to make the 'declarations or remedial orders which are asked for in the said Memorials and Petitions, 'assuming the material facts to be as stated therein, or has His Excellency the Governor 'General in Council any other jurisdiction in the premises?'

"'(6) Did the Acts of Manitoba relating to education, passed prior to the Session of 1890, confer on or continue to the minority a 'right or privilege in relation to education' within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools within the meaning of subsection 3 of section 93 of the British North America Act, 1867,' if said section 93 be found to be applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council?' that Counsel for the Appellants and for other Roman Catholic subjects of Her Majesty in the province of Manitoba and Counsel for the province of Manitoba appeared before the Supreme Court as did also the Solicitor General for Canada who appeared to submit the case on behalf of Her Majesty's Crown: that the counsel for the province of Manitoba not desiring to be heard, the Supreme Court pursuant to section 4 of the Act of 1891, hereinbefore referred to, requested counsel to argue the case in the interest of the said province and counsel thereupon appeared and argued the case for the said province as did also counsel for the appellants and other Roman Catholics as aforesaid, but the Solicitor General for Canada did not desire to be heard: that the case came on for argument before five judges of the Supreme Court who on the 20th February, 1894, delivered their opinions thereon in the manner provided by the statute: that in the result the opinions of the judges of the Supreme Court showed a majority of three judges out of five for a negative answer to all the six questions submitted for the opinion of the Supreme Court: that the appellants feeling aggrieved by the said opinions presented a petition to Your Majesty in Council praying for special leave to appeal therefrom to Your Majesty in Council and by Your Majesty's Order in Council of the 27th June, 1894, leave to appeal was granted accordingly upon the condition that the appellants should deposit the sum of £300 sterling in the registry of the Privy Council, as security for costs: that the said sum was deposited accordingly and humbly praying that Your Majesty in Council, will be pleased to take their said appeal into consideration and that the said opinions of the judges of the Supreme Court of Canada of the 20th February, 1894, may be reversed or varied or for other relief in the premises."

"The Lords of the committee in obedience to Your Majesty's said general order of reference, have taken the said humble petition and appeal into consideration, and having heard counsel for the parties on both sides, their lordships do this day agree humbly to report to Your Majesty as their opinion that the said questions hereinbefore set forth ought to be answered as follows:—

"(1) In answer to the first question:—That the appeal referred to in the said memorials and petitions, and asserted thereby is such an appeal as is admissible under subsection 2 of section 22 of the Manitoba Act, 33 Vict. (1870), c. 3, Canada.

"(2) In answer to the second question:—That grounds are set forth in the petitions and memorials, such as may be the subject of appeal under the authority of the subsection of the Manitoba Act immediately above referred to.

"(3) In answer to the third question:—That the decision of the Judicial Committee of the Privy Council in the cases of *Barrett* v. *The City of Winnipeg*, and *Logan* v. *The City of Winnipeg* does not dispose of, or conclude, the application for redress based on the contention that the rights of the Roman Catholic minority, which accrued to them after the Union under the Statutes of the Province, have been interfered with by the two Statutes of 1890 complained of in the said petitions and Memorials.

"(4) In answer to the fourth question:—That subsection 3 of section 93 of the British North America Act, 1867, does not apply to Manitoba.

"(5) In answer to the fifth question:—That the Governor General in Council has jurisdiction and the appeal is well founded, but that the particular course to be pursued must be determined by the authorities to whom it has been committed by the Statute; that the general character of the steps to be taken is sufficiently defined by subsection 3 of section 22 of the Manitoba Act, 1870.

"(6) In answer to the sixth question:—That the Acts of Manitoba relating to education passed prior to the session of 1890 did confer on the minority a right or privilege in relation to education within the meaning of subsection 2 of section 22 of the Manitoba Act, which alone applies; that the two Acts of 1890 complained of did affect a right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council.

"And in case Your Majesty should be pleased to approve of this report, then their Lordships do direct that the parties do bear their own costs of this appeal, and that the sum of £300 sterling so deposited by the appellants as aforesaid, be repaid to them."

Her Majesty having taken the said report into consideration, was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the recommendations and directions therein contained be punctually observed, obeyed, and carried into effect in each and every particular. Whereof the Governor General of the Dominion of Canada for the time being, and all other persons whom it may concern are to take notice and govern themselves accordingly.

C. L. PEEL.

REMEDIAL ORDER IN COUNCIL

833.

AT THE GOVERNMENT HOUSE AT OTTAWA,
TUESDAY, the 19th day of March, 1895.

Present:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL.

The Committee of the Privy Council have the honour to report that by the Act passed by the Parliament of Canada in the thirty-third year of Her Majesty's reign, chapter three, intituled:

"An Act to amend and continue the Act 32 and 33 Victoria, chapter 3, and to establish and provide for the Government of the Province of Manitoba (commonly called and hereinafter cited as the Manitoba Act") which Act was confirmed by "The British North America Act, 1871" (34-35 Vic., cap. 28, Imp.) it is provided that:

"In and for the Province of Manitoba the said Legislature of the province may exclusively make laws in relation to education, subject and according to the following provisions:

1. "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the Union.

2. "An Appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

3. "In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section."

That by certain Acts of the Legislature of the Province of Manitoba passed after the Union, and by an Act passed by the said Legislature in the forty-fourth year of Her Majesty's reign, chapter four, which may be cited as "The Manitoba School Act" and by the Acts amending the same, the Roman Catholic minority of Her Majesty's subjects in Manitoba acquired the rights and privileges in relation to education thereby conferred upon them, including the right to build, maintain, equip, manage, conduct and support Roman Catholic schools in the manner provided by the said Statutes, the right to a proportionate share of any grant made out of the public funds for the purpose of education, and the right of exemption of such members of the Roman Catholic Church as contribute to such Roman Catholic schools from all payments or contributions to the support of any other schools.

That subsequently in the fifty-third year of Her Majesty's reign two statutes were passed by the Legislature of the Province of Manitoba relating to education, which Statutes came into force on the first day of May, 1890, and are intituled respectively "An Act respecting the Department of Education" and "An Act respecting Public Schools."

That the Roman Catholic minority of Her Majesty's subjects in Manitoba considered that by the two Statutes last mentioned the aforesaid rights and privileges were affected, and that such minority was thereby deprived of said right and privileges. That the said Roman Catholic minority thereupon appealed from the said two Statutes

last mentioned to the Governor General in Council and by a petition presented on the 26th day of November, 1892, after setting out the facts of the case, prayed as follows :—

"That His Excellency the Governor General in Council might entertain the appeal and might consider the same and might make such provision and give such directions for the hearing and consideration of the said appeal as might be thought proper.

2. "That it might be declared that the said Acts (53 Victoria, chapters 37 and 38) do prejudicially affect the rights and privileges with regard to denominational schools, which Roman Catholics had by law or practice in the province at the Union.

3. "That it might be declared that the said last mentioned Acts do affect the rights and privileges of the Roman Catholic minority of the Queen's subjects in relation to education.

4. "That it might be declared that to His Excellency the Governor General in Council, it seems requisite that the provisions of the Statutes in force in the Province of Manitoba, prior to the passage of the said Acts, should be re-enacted in so far at least as may be necessary to secure to the Roman Catholics in the said province the right to build, maintain, equip, manage, conduct and support these schools in the manner provided for by the said Statutes, to secure to them their proportionate share of any grant made out of the public funds for the purposes of education and to relieve such members of the Roman Catholic Church as contribute to such Roman Catholic schools from all payment or contribution to the support of any other schools, or that the said Act of 1890 should be so modified or amended as to affect such purposes.

5. "And that such further or other declaration or order might be made as to His Ecxellency the Governor General in Council might, under the circumstances, seem proper, and that such directions might be given, provisions made and all things done in the premises for the purpose of affording relief to the said Roman Catholic minority in the said province as to His Excellency the Governor General in Council might seem meet."

That the said petition was referred by the Governor General in Council to a sub-committee of Council. The sub-committee sat on the 26th day of November, 1892, when Mr. Ewart, Q.C., on behalf of the Roman Catholic minority, presented the said petition and stated reasons in support of the right of appeal. That the report of the sub-committee thereon was approved by Order of His Excellency in Council on the 29th day of December, 1892, and the 21st day of January, 1893, was then fixed as the day on which the parties concerned should be heard, with regard to the appeal. In the said report of the sub-committee, it is stated as follows :—

As to the request which the petitioners make in the second paragraph of their prayer, viz. :—"That it may be declared that the said Acts (53 Vic., chapters 37 and 38) do prejudicially affect the rights and privileges with regard to denominational schools which the Roman Catholics had by law or practice in the Province of Manitoba at the time of the union," the sub-committee are of opinion that the judgment of the Judicial Committee of the Privy Council is conclusive as to the rights with regard to denominational schools which the Roman Catholics had at the time of the union, and as to the bearing thereon of the Statutes complained of, and Your Excellency is not, therefore, in the opinion of the sub-committee, properly called upon to hear an appeal based on those grounds. That judgment is as binding on Your Excellency as it is on any of the parties to the litigation, and, therefore, if redress is sought on account of the state of affairs existing in the Province at the time of the union, it must be sought elsewhere and by other means than by way of appeal under the sections of the British North America Act and of the Manitoba Act, which are relied on by the petitioners as sustaining this appeal.

The two Acts of 1890, which are complained of, must, according to the opinion of the sub-committee, be regarded as within the powers of the Legislature of Manitoba, but it remains to be considered whether the appeal should be entertained and heard as an appeal against Statutes which are alleged to have encroached on rights and privileges with regard to denominational schools which were acquired by any class of persons in Manitoba, not at the time of the union, but after the union.

The sub-committee were addressed by counsel for the petitioners as to the right to have the appeal heard, and from his argument, as well as from the documents, it would seem that the following are the grounds of the appeal.

A complete system of separate and denominational schools, *i.e.*, a system providing for public schools and for separate Catholic schools, was, it is alleged, established by Statute of Manitoba in 1871 and by a series of subsequent Acts. That system was in operation until the two Acts of 1890 (chapters 37 and 38) were passed.

The 93rd section of the British North America Act, in conferring power on the provincial legislatures, exclusively, to make laws in relation to education, imposed on that power certain restrictions, one of which was (subsection 1) to preserve the right with respect to denominational schools which any class of persons had by law in the province at the union. As to this restriction it seems to impose a condition on the validity of any Act relating to education, and the sub-committee have already observed that no question, it seems to them, can arise, since the decision of the Judicial Committee of the Privy Council.

The third subsection, however, is as follows:—

"Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the Governor General in Council, from any Act or decision of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

The Manitoba Act passed in 1870, by which the Province of Manitoba was constituted, contains the following provisions, as regards that province:—

By section 22 the power is conferred on the legislature, exclusively, to make laws in relation to education, but subject to the following restrictions:

1. "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice, in the province, at the union."

This restriction, the sub-committee again observe, has been dealt with by the judgment of the Judicial Committee of the Privy Council.

Then follows:—

2. "An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

It will be observed that the restriction contained in subsection 3 is not identical with the restriction of subsection 3 of the 93rd section of the British North America Act, and questions are suggested, in view of this difference, as to whether subsection 3, of section 93 of the British North America Act applies to Manitoba Act and if not whether subsection 2 of section 22 of the Manitoba Act is sufficient to sustain the case of the appellants; or, in other words, whether in regard to Manitoba, the minority has the same protection against laws which the Legislature of the Province has power to pass as the minorities in other provinces have under the subsection before quoted from the British North America Act, as to separate or denominational schools established after the union.

The argument presented by counsel on behalf of the petitioners was, that the present appeal comes before Your Excellency in Canada, not as a request to review the decision of the Judicial Committee of the Privy Council, but as a logical consequence and result of that decision, inasmuch as the remedy now sought is provided by the British North America Act, and the Manitoba Act, not as a remedy to the minority against statutes which interfere with the rights which the minority had at the time of the union, but as a remedy against statutes which interfere with rights acquired by the minority after the union. The remedy, therefore, which is sought, is against Acts which are *intra vires* of the Provincial Legislature. His argument is also that the appeal does not ask Your Excellency to interfere with any rights or powers of the Legislature of Manitoba, inasmuch as the power to legislate on the subject of education has only been conferred on that legislature with the distinct reservation that Your

Excellency in Council shall have power to make remedial orders against any such legislation which infringes on rights acquired after the union by any Protestant or Roman Catholic minority in relation to separate or dissentient schools.

Upon the various questions which arise on these petitions the sub-committee do not feel called upon to express an opinion, and so far as they are aware, no opinion has been expressed on any previous occasion in this case or any other of a like kind, by Your Excellency's Government or any other Government of Canada, Indeed, no application of a parallel character has been made since the establishment of the Dominion.

The application comes before Your Excellency in a manner differing from applications which are ordinarily made, under the constitution, to Your Excellency-in-Council. In the opinion of the sub-committee, the application is not to be dealt with at present as a matter of a political character or involving political action on the part of Your Excellency's advisers. It is to be dealt with by Your Excellency-in-Council, regardless of the personal views which Your Excellency's advisers may hold with regard to denominational schools and without the political action of any of the members of Your Excellency's Council being considered as pledged by the fact of the appeal being entertained and heard. If the contention of the petitioners be correct, that such an appeal can be sustained, the inquiry will be rather of a judicial than a political character. The sub-committee have so treated it in hearing counsel, and in permitting their only meeting to be open to the public. It is apparent that several other questions will arise, in addition to those which were discussed by counsel at that meeting, and the sub-committee advise that a date be fixed, at which the petitioners, or their counsel, may be heard with regard to the appeal, according to their first request.

The sub-committee think it proper that the Government of Manitoba should have an opportunity to be represented at the hearing, and they further recommend, with that view, that if this report should be approved, a copy of any minute approving it, and of any minute fixing the date of the hearing with regard to the appeal, be forwarded, together with copies of all the petitions referred to, to His Honour the Lieutenant-Governor of Manitoba, for the information of His Honour's advisers.

In the opinion, of the sub-committee, the attention of any person who may attend on behalf of the petitioners, or on behalf of the Provincial Government, should be called to certain preliminary questions which seem to arise with regard to the appeal.

Among the questions which the sub-committee regard as preliminary are the following:—

(1.) Whether this appeal is such an appeal as is contemplated by subsection 3 of section 93 of the British North America Act, or by subsection 2 of section 22 of the Manitoba Act.

(2.) Whether the grounds set forth in the petitions are such as may be the subject of appeal under either of the sub-sections above referred to.

(3.) Whether the decision of the Judical Committee of the Privy Council in any way bears on the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union have been interfered with by the two statutes of 1890 before referred to.

(4.) Whether subsection 3 of section 93 of the British North America Act applies to Manitoba.

(5.) Whether Your Excellency in Council has power to grant such orders as are asked for by the petitioner, assuming the material facts to be as stated in the petition.

(6.) Whether the Acts of Manitoba, passed before the session of 1890, conferred on the minority a "right or privilege with respect to education," within the meaning of subsection 2 of section 22 of the Manitoba Act, or established "a system of separate or dissentient schools," within the meaning of subsection 3 of section 93 of the British North America Act, and if so, whether the two Acts of 1890, complained of, affect "the right or privilege" of the minority in such a manner as to warrant the present appeal.

Other questions of a like character may be suggested at the hearing, and it may be desirable that arguments should be heard upon such preliminary points before any hearing shall take place on the merits of the appeal.

That such appeal accordingly came on for hearing before the Governor General in Council on the 21st day of January, 1893, in the presence of counsel for the Roman Catholic minority, the Province of Manitoba, though duly notified, not appearing and when after hearing what was alleged on behalf of the Roman Catholic minority, it was considered that certain questions of law arising upon the appeal should be referred to the Supreme Court of Canada for hearing and consideration pursuant to the Supreme and Exchequer Courts Act (Revised Statutes of Canada, chapter 135) as amended by the Act of 1891 (54-55 Victoria, cap. 25), and that the further hearing should be adjourned until the advice of the court had been obtained thereon.

That pursuant to the Supreme and Exchequer Court Acts as so amended, the following questions were therefore referred to the Supreme Court of Canada by the Governor General in Council, namely :—

(1.) "Is the appeal referred to in the said memorials and petitions and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of 'The British North America Act, 1867,' or by subsection 2 of section 22 of 'The Manitoba Act,' 33 Victoria (1870), chapter 3 of Canada?

(2.) "Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, or either of them?"

(3.) "Does the decision of the Judicial Committee of the Privy Council, in the case of Barrett *vs.* The City of Winnipeg, and Logan *vs.* The city of Winnipeg, dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union, under the Statutes of the province, has been interfered with by the two Statutes of 1890, complained of in the said petitions and memorials.

(4.) "Does the subsection 3 of section 93 of 'The British North America Act, 1867,' apply to Manitoba?"

(5.) "Has His Excellency the Governor Ceneral in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor General in Council any other jurisdiction in the premises?

(6.) "Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of 'The Manitoba Act,' or estab ish a system of separate or dissentient schools within the meaning of subsection 3 of section 93 of 'The British North America Act, 1867,' if said section 93 be found to be applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them affect any right or privilege of the minority in such manner that an appeal will lie thereunder to the Governor General in Council?"

That upon the hearing of the said reference before the Supreme Court of Canada, counsel for the Roman Catholic minority of Her Majesty's subjects in the Province of Manitoba, and counsel for the Province of Manitoba appeared before the Supreme Court, as did also the Solicitor General for Canada, who appeared to submit the case on behalf of Her Majesty's Crown; that the Counsel for the Province of Manitoba not desiring to be heard, the Supreme Court pursuant to section 4 of the Act of 1891, hereinbefore referred to, requested counsel to argue the case in the interest of the said province, and counsel thereupon appeared and argued the case for the said province as did also counsel for the Roman Catholic minority as aforesaid. That the case came on for argument before five judges of the Supreme Court, who, on the 20th February, 1894, delivered their opinions thereon in the manner provided by the Statutes: That in the result the opinions of the judges of the Supreme Court showed a majority of three judges, out of five for a negative answer to all the six questions submitted for the opinion of the Supreme Court: That the Roman Catholic minority feeling aggrieved by the said opinions, presented a petition to Her Majesty in Council, praying for special leave to appeal therefrom to Her Majesty in Council and by Her Majesty's Order in Council of the 27th June, 1894, leave to appeal was granted accordingly.

That such appeal to Her Majesty in Council was duly perfected and was heard before the Judicial Committee of Her Majesty's Privy Council on 11th, 12th and 13th days of December, 1894, counsel being then heard both on behalf of the appellants and the province of Manitoba, and on the 29th day of January following the Lords of the Judical Committee delivered judgment allowing the appeal and reversing the opinion of the Supreme Court of Canada, their Lordships stating that they were unable to see how the question as to whether a right or privilege which the Roman Catholic minority previously enjoyed had been affected by the legislation of 1890 could receive any but an affirmative answer and added:

"Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools of which the control and management were in the hands of Roman Catholics who could select the books to be used and determine the character of the religious teachings. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for those purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the statute fall alike on Catholics and Protestants. Moreover, while Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctly Protestant in their character.

"In view of this comparison, it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected."

Their Lordships also stated:—

"As a matter of fact the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the education question prior to 1870. This is recognized and emphasized in almost every line of those enactments. There is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of "The Manitoba Act" of 1870, which was in truth a Parliamentary compact, must be read."

And in conclusion their Lordships added:—

"For the reasons which have been given, their Lordships are of opinion that the 2nd subsection of 22 of "The Manitoba Act" is the governing enactment and that appeal to the Governor General in Council was admissible by virtue of that enactment, on the grounds set fo th in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that subsection. The further question is submitted whether the Governor General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions or has any other jurisdiction in the premises. Their Lordships have decided that the Governor General in Council has jurisdiction and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities, to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd subsection of section 22 of "The Manitoba Act."

"It is certainly not essential that the statutes repealed by the Act of 1890 should be re enacted or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to and

adequately supplies the wants of the great majority of the inhabitants of the province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded and were modified so far as might be necessary to give effect to these provisions."

The Lords of the Committee thereupon reported to Her Majesty that the said questions hereinbefore set forth ought to be answered as follows:—

1. "In answer to the first question: That the appeal referred to in the said memorials and petitions and asserted thereby is such an appeal as is admissible under subsection 2 of section 22 of "The Manitoba Act," 33 Victoria (1870) Chapter 3, Canada.

2. "In answer to the second question: That grounds are set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsection of "The Manitoba Act" above referred to.

3. "In answer to the third question: That the decision of the Judicial Committee of the Privy Council in the cases of Barrett *vs.* The City of Winnipeg and Logan *vs.* The City of Winnipeg, does not dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the Statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petition and memorials.

4. "In answer to the 4th question: That subsection 3 of section 93 of 'The British North America Act 1867,' did not apply to Manitoba.

5. "In answer to the 5th question: That the Governor General in Council has jurisdiction and the Appeal is well founded but that the particular course to be pursued must be determined by the authorities to whom it has been committed by the Statute; that the general character of the steps to be taken is sufficiently defined by subsection 3 of section 22 of 'The Manitoba Act' of 1870.

6. "In answer to the 6th question: That the Acts of Manitoba relating to education passed prior to the session of 1890, did confer on the minority a right or privilege in relation to education within the meaning of subsection 2 of section 22 of 'The Manitoba Act' which alone applies; that the two Acts of 1890 complained of did affect a right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council."

And Her Majesty at the Court at Osborne House in the Isle of Wight, on the 2nd day of February, 1895, after taking the said report into consideration was pleased by and with the advice of Her Majesty's Privy Council to approve of the said report of the Lords of the Committee and to order that "the recommendation and directions therein contained be punctually observed, obeyed and carried into effect in each and every particular, whereof the Governor General of the Dominion of Canada for the time being and all other persons whom it may concern, are required to take notice and govern themselves accordingly."

That after the determination of the said questions by Her Majesty in Council as aforesaid the said appeal of the Roman Catholic minority of Her Majesty's subjects in Manitoba from the two Statutes of the Legislature of the Province of Manitoba hereinbefore mentioned came on for further hearing before Your Excellency in Council on the 26th day of February, and the 5th, 6th and 7th days of March, 1895, in the presence of Counsel both for the Roman Catholic minority of Her Majesty's subjects in the Province of Manitoba and for the said province and the committee having heard and considered what was alleged by Counsel on both sides as well as the judgment of their Lordships of the Judicial Committee of the Privy Council is of opinion that effect should be given to the said appeal and that the said appeal should be allowed in so far as it relates to rights acquired by the said Roman Catholic minority under legislation of the Province of Manitoba passed subsequently to the union of the Province with the Dominion of Canada.

The Committee therefore recommend that the said appeal be allowed and that Your Excellency in Council do adjudge and decide that by the two Acts passed the Legislature of the Province of Manitoba on the 1st day of May 1890, intituled respectively "An Act respecting the Department of Education," and an Act respecting the Public Schools," the rights and privileges of the Roman Catholic minority of the said province

in relation to education, prior to the 1st day of May, 1890, have been affected by depriving the Roman Cathalic minority of the following rights and privileges, which previous to and until the 1st day of May, 1890, such minority had, viz. :

(a.) The right to build, maintain, equip, manage, conduct and support Roman Catholic schools in the manner provided for by the said Statutes, which were repealed by the two Acts of 1890 aforesaid.

(b.) The right to share proportionately in any grant made out of the public funds for the purposes of education.

(c.) The right of exemption of such Roman Catholics as contribute to Roman Catholic schools from all payment or contribution to the support of any other schools.

And the Committee also recommend that Your Excellency in Council do further declare and decide that for the due execution of the provisions of section 22 of "The Manitoba Act," it seems requisite that the system of education embodied in the two Acts of 1890 aforesaid should be supplemented by a Provincial Act or Acts which would restore to the Roman Catholic minority the said rights and privileges of which such minority has been so deprived as aforesaid and which would modify the said Acts of 1890 so far, and so far only, as may be necessary to give effect to the provisions restoring the rights and privileges in paragraphs (a), (b) and (c) hereinbefore mentioned.

The Committe desire to add that: Their Lordships of the Judicial Committee state in their judgment :—

"Bearing in mind the circumstances which existed in 1870, it does not appear to Their Lordships an extravagant notion that in creating a legislature for the province with limited powers, it should have been thought expedient in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be."

In the opinion of the Committee "The Manitoba Act" as construed with regard to the present case by the Judicial Committee of Her Majesty's Privy Council, so clearly points to a duty devolving upon Your Excellency in Council that no course is open consistent with both the letter and the spirit of the constitution other than that recommended. To dismiss this appeal would be not only to deny to the Roman Catholic minority rights substantially guaranteed to them under the constitution of Canada, but in truth such a course might involve the declaration on the part of Your Excellency in Council that this provision of the constitution for the protection of the rights of certain of Her Majesty's subjects in Manitoba should not in any case be acted upon; and further the Committee do not perceive upon what principle consistently with a declaration that effect is not to be given to this appeal, the Protestant or Roman Catholic minority in Quebec or Ontario could invoke the corresponding provision of section 93 of "The British North America Act" in case of any Provincial Act or decision affecting their rights or privileges.

If Your Excellency should see fit to approve of the foregoing recommendation, the Committee desire to state that it follows that refusal or neglect on the part of the Legislature of Manitoba to enact remedial legislation which to Your Excellency in Council seems requisite will confer upon Parliament authority to pass such a law. In this connection, it was urged by Counsel on behalf of the province that should Parliament legislate under these circumstances its enactment would be absolute and irrevocable so far as both Parliament and the Provincial Legislature are concerned.

The Committee, without necessarily adopting this view, observe that section 22 of "The Manitoba Act" may admit of that construction. The Committee, therefore, recommend that the Provincial Legislature be requested to consider whether its action upon the decision of Your Excellency in Council should be permitted to be such as while refusing to redress a grievance which the highest court in the Empire has declared to exist, may compel Parliament to give the relief of which under the constitution the Provincial Legislature is the proper and primary source, thereby according to this view, permanently divesting itself in a very large measure of its authority and so establishing in the province an educational system which no matter what changes may take place in

the circumstances of the country or the views of the people, cannot be altered or repealed by any legislative body in Canada.

The Committee, further and for the reasons hereinbefore stated, recommend that if Your Excellency in Council should be pleased to approve of this report, Your Excellency in Council do make an Order in the premises in the form and to the effect as set forth hereunto submitted, and that a certified copy of this Minute and of the said Order be transmitted to His Honour the Lieuteuant-Governor of Manitoba for his information and that of his government and Provincial Legislature, also that a certified copy of this Minute and of the said Order be transmitted to Mr. Ewart, Q.C., of Winnipeg, as representing the Roman Catholic minority of Her Majesty's subjects in Manitoba.

All of which is respectfully submitted for Your Excellency's approval.

JOHN J. McGEE,
Clerk of the Queen's Privy Council for Canada.

(Sd) ABERDEEN.

Privy.

L. S.

Seal.

834.

AT THE GOVERNMENT HOUSE AT OTTAWA,
THURSDAY, the 21st day of March, 1895

Present:

HIS EXCELLENCY THE GOVERNOR GENERAL.

The Honourable Sir Mackenzie Bowell.	The Honourable J. A. Ouimet.
Sir Adolphe P. Caron.	T. Mayne Daly.
John Costigan.	A. R. Angers.
George E. Foster.	W. B. Ives.
Sir Charles Hibbert Tupper.	A. R. Dickey.
John Haggart.	W. H. Montague.

In Council.

Whereas, on the 26th day of November, 1892, a petition by way of appeal under the provision of section 22 of chapter 3 of the Acts of the Parliament of Canada, passed in the 33rd year of Her Majesty's reign, and intituled "An Act to amend and continue "the Act 32-33 Victoria, chapter 3, and to establish and provide for the government "of the province of Manitoba (commonly called 'The Manitoba Act') and confirmed by "The British North America Act of 1871," was presented to His Excellency the Governor General of Canada in Council, by and on behalf of the Roman Catholic minority of Her Majesty's subjects, in the province of Manitoba, which petition, among other things, alleged in effect that by certain Acts of the legislature of the province of Manitoba, passed after the union, and by an Act passed by the said legislature in the forty-fourth year of Her Majesty's reign, chapter four, which may be cited as "The Manitoba School Act" and by the Acts amending the same, the Roman Catholic minority of Her Majesty's subjects in Manitoba acquired the rights and privileges in relation to education thereby conferred upon them, including the right to build, maintain, equip, manage, conduct and support Roman Catholic schools in the manner provided by the said statutes, the right to a proportionate share of any grant made out of the public funds for the purposes of education, and the right of exemption of such members of the Roman Catholic Church, as contribute to such Roman Catholic schools, from all payments or contributions to the support of any other schools.

That subsequently, in the 53rd year of Her Majesty's reign, two statutes were passed by the legislature of the province of Manitoba, relating to education, which Statutes came into force on the first day of May, 1890, and are intituled respectively "An Act respecting the Department of Education," and "An Act respecting Public Schools," and that the effect of the two last named statutes was to repeal the previous Acts of the province of Manitoba in relation to education, and to deprive the Roman Catholic minority of the rights and privileges which it had acquired under such previous statutes; and by the said petition, the said Roman Catholic minority prayed among other things:—

That it might be declared that the said last mentioned Acts did affect the rights and privileges of the said Roman Catholic minority of the Queen's subjects in relation to education:—

That it might be declared that to His Excellency the Governor General in Council it seems requisite that the provisions of the statutes in force in the province of Manitoba, prior to the passage of the said Acts, should be re-enacted in so far, at least, as may be necessary to secure to the Roman Catholics in the said Province the right to build, maintain, equip, manage, conduct and support their schools in the manner provided for by said statutes, to secure to them their proportionate share of any grant made out of the public funds for the purposes of education, and to relieve such members of the Roman Catholic Church, as contribute to such Roman Catholic schools, from all payment or contribution to the support of any other schools; or that the said Acts of 1890, should be so modified or amended as to effect such purposes :—

And that such further or other declaration or order might be made as to His Excellency the Governor General in Council should, under the circumstances, seem proper, and that such directions might be given, provisions made, and all things done in the premises, for the purpose of affording relief to the said Roman Catholic minority in the said Province, as to His Excellency in Council might seem meet.

And whereas the 26th day of February, 1895, having been appointed for the hearing of the said appeal, and the same coming on to be heard on that day, and on the 5th, 6th and 7th days of March, 1895, in the presence of counsel for the Petitioners (the said Roman Catholic minority of Her Majesty's subjects in the province of Manitoba) and as well for the province of Manitoba, upon reading the said petition and the statutes therein referred to, and upon hearing what was alleged by counsel on both sides, His Excellency the Governor General in Council was pleased to order and adjudge, and it is hereby ordered and adjudged, that the said appeal be, and the same is hereby allowed, in so far as it relates to rights acquired by the said Roman Catholic minority under legislation of the province of Manitoba, passed subsequent to the union of that province with the Dominion of Canada, and His Excellency the Governor General in Council was pleased to adjudge and declare, and it is hereby adjudged and declared that by the two Acts passed by the Legislature of the province of Manitoba, on the first day of May, 1890, intituled respectively "An Act respecting the Department of Education," and "An Act respecting Public Schools," the rights and privileges of the Roman Catholic minority of the said province, in relation to education, prior to the 1st day of May, 1890, have been affected by depriving the Roman Catholic minority of the following rights and privileges, which, previous to and until the 1st day of May, 1890, such minority had, viz. :—

(*a*) The right to build, maintain, equip, manage, conduct and support Roman Catholic schools, in the manner provided for by the said statutes which were repealed by the two Acts of 1890 aforesaid.

(*b*) The right to share proportionately in any grant made out of the public funds for the purposes of education.

(*c*) The right of exception of such Roman Catholics, as contribute to Roman Catholic schools, from all payment or contribution to the support of any other schools.

And His Excellency the Governor General in Council was further pleased to declare and decide, and it is hereby declared that it seems requisite that the system of education embodied in the two Acts of 1890 aforesaid, shall be supplemented by a Provincial Act or Acts which will restore to the Roman Catholic minority the said rights and privileges of which such minority has been so deprived as aforesaid, and which will modify the said Acts of 1890, so far and so far only as may be necessary to give effect to the provisions restoring the rights and privileges in paragraphs (*a*), (*b*), (*c*), hereinbefore mentioned.

Whereof the Lieutenant Governor of the province of Manitoba for the time being, and the legislature of the said province, and all persons whom it may concern, are to take notice and govern themselves accordingly.

JOHN J. McGEE,
Clerk of the Queen's Privy Council for Canada.